

RISK MANAGEMENT PROVISIONS (MARCH 2008)

The following are examples of appropriate and approved indemnification and insurance clauses with instructions for use that comply with N.D.C.C. § 32-12.2-13 and N.D.C.C. § 32-12.2-17, the recommendations of the office of the Attorney General and the Risk Management Division, and the rules and directives of the Procurement Office. The clauses are intended to either be incorporated into the body of a contract or be used as an appendix to a solicitation (i.e. Informal Request for Bids, Informal Request for Proposal, Invitation for Bid, or Request for Proposal), and then be incorporated into the purchase order or contract.

Remember to consult with Risk Management or legal counsel before making revisions to the recommended clauses.

Services Agreements

Low Rated Risk Analysis –

Agreements between State Agencies:

Indemnification

The State and Contractor each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

Insurance

The State and Contractor each shall secure and keep in force during the term of this agreement, from an insurance company, government self-insurance pool or government self-retention fund authorized to do business in North Dakota, commercial general liability with minimum limits of liability of \$250,000 per person and \$1,000,000 per occurrence.

Routine Agreements with Political Subdivisions:

Indemnification

The State and Political Subdivision (Contractor) each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$500,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$500,000 per occurrence.
- 3) Workers compensation coverage meeting all statutory requirements.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. The amount of any deductible or self retention is subject to approval by the State.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The insurance required in this agreement, through a policy or endorsement, shall include a provision that the policy and endorsements may not be canceled or modified without thirty (30) days' prior written notice to the undersigned State representative.
- 4) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement.
- 5) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.

Professional Service Agreements Not Requiring On-site Services

Indemnification

The State and Contractor each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 2) Professional errors and omissions, including a three year "tail coverage endorsement," with minimum liability limits of \$1,000,000 per occurrence and in the aggregate.
- 3) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$500,000 per occurrence.
- 4) Workers compensation coverage meeting all statutory requirements.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. The amount of any deductible or self retention is subject to approval by the State.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage.

Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.

- 3) The insurance required in this agreement, through a policy or endorsement, shall include a provision that the policy and endorsements may not be canceled or modified without thirty (30) days' prior written notice to the undersigned State representative.
- 4) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement.
- 5) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.

Moderate Rated Risk Analysis –

Professional Services Agreements Requiring On-site Services

Indemnification

Contractor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of the Contractor or its agent, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred if the State prevails in an action against Contractor in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.

NOTE: OPTIONAL CLAUSE (4) EMPLOYER'S LIABILITY.

**THIS COVERAGE IS RECOMMENDED FOR CONTRACTORS DOMICILED
OUTSIDE THE STATE OF NORTH DAKOTA.**

**DELETE (4) IF CONTRACTING WITH A
RESIDENT (NORTH DAKOTA) VENDOR.**

OPTION: DELETE IF NOT REQUIRED

- 4) Employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.
- 5) Professional errors and omissions, including a three year "tail coverage endorsement," with minimum liability limits of \$1,000,000 per occurrence and in the aggregate.

The insurance coverages listed above must meet the following additional requirements:

NOTE: OPTIONAL SENTENCE IN (1)

**"THE AMOUNT OF ANY DEDUCTIBLE OR SELF-RETENTION IS SUBJECT TO
APPROVAL BY THE STATE."**

**THIS SENTENCE IS NEEDED WHEN THERE IS A QUESTION ABOUT THE
FINANCIAL WHEREWITHAL OF THE VENDOR TO SELF RETAIN THE
EXPOSURE. THIS REQUIREMENT DOES NOT PERTAIN TO LARGE,
FINANCIALLY VIABLE POTENTIAL VENDORS.**

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor.

OPTIONAL SENTENCE: DELETE IF NOT USED

The amount of any deductible or self-retention is subject to approval by the State.

- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.
- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies.
- 5) The insurance required in this agreement, through a policy or endorsement, shall include:
 - a) "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
 - b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned State representative;
 - c) a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
 - d) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that

- any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
- e) cross liability/severability of interest for all policies and endorsements;
 - f) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
 - g) The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.

NOTE: SENTENCE (6)

WHEN AN ADDITIONAL INSURED ENDORSEMENT IS REQUIRED IT MAY TAKE UP TO 90 DAYS UNTIL THE INSURANCE CARRIER PROVIDES IT. MAKE SURE THAT YOU VERIFY RECEIPT OF THE ENDORSEMENT WITHIN 90 DAYS.

- 6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
- 7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

Default Provisions for Routine Non-Professional Service Contracts

Indemnification

Contractor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of the Contractor or its agent, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred if the State prevails in an action against Contractor in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.

- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.

NOTE: OPTIONAL CLAUSE (4) EMPLOYER'S LIABILITY.

**THIS COVERAGE IS RECOMMENDED FOR CONTRACTORS DOMICILED
OUTSIDE THE STATE OF NORTH DAKOTA.**

**DELETE (4) IF CONTRACTING WITH A
RESIDENT (NORTH DAKOTA) VENDOR.**

OPTION: DELETE IF NOT REQUIRED

- 4) Employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

NOTE: OPTIONAL SENTENCE IN (1)

**"THE AMOUNT OF ANY DEDUCTIBLE OR SELF-RETENTION IS SUBJECT TO
APPROVAL BY THE STATE."**

**THIS SENTENCE IS NEEDED WHEN THERE IS A QUESTION ABOUT THE
FINANCIAL WHEREWITHAL OF THE VENDOR TO SELF RETAIN THE
EXPOSURE. THIS REQUIREMENT DOES NOT PERTAIN TO LARGE,
FINANCIALLY VIABLE POTENTIAL VENDORS.**

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor.

OPTIONAL SENTENCE: DELETE IF NOT USED

The amount of any deductible or self-retention is subject to approval by the State.

- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.
- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies.
- 5) The insurance required in this agreement, through a policy or endorsement, shall include:

- a) a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
- b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned State representative;
- c) a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
- d) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
- e) cross liability/severability of interest for all policies and endorsements;
- f) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
- g) The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.

NOTE: SENTENCE (6)

WHEN AN ADDITIONAL INSURED ENDORSEMENT IS REQUIRED IT MAY TAKE UP TO 90 DAYS UNTIL THE INSURANCE CARRIER PROVIDES IT. MAKE SURE THAT YOU VERIFY RECEIPT OF THE ENDORSEMENT WITHIN 90 DAYS.

- 6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
- 7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

High Rated Risk Analysis –

Contracts Requiring More Stringent Indemnification -

(For example, contracts for construction, alteration, renovation, or maintenance of a building, structure, highway, road, bridge, water line, railroad right of entry, sewer line, oil line, gas line, appurtenance, appliance or other improvement to real property, including any moving, demolition or excavation, carnival rides):

Note: Use of the following provisions requires authorization from OMB Director's Designee. Use SFN 58571 to obtain authorization.

Indemnification

Contractor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from claims resulting from the performance of the contractor or its agent, including all costs, expenses and attorneys' fees, which may in any

manner result from or arise out of this agreement. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Contractor shall secure and keep in force during the term of this agreement and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.

NOTE: OPTIONAL CLAUSE (4) EMPLOYER'S LIABILITY.

**THIS COVERAGE IS RECOMMENDED FOR CONTRACTORS DOMICILED
OUTSIDE THE STATE OF NORTH DAKOTA.
DELETE (4) IF CONTRACTING WITH A
RESIDENT (NORTH DAKOTA) VENDOR.**

OPTION: DELETE IF NOT REQUIRED

- 4) Employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

NOTE: OPTIONAL SENTENCE IN (1)

**"THE AMOUNT OF ANY DEDUCTIBLE OR SELF-RETENTION IS SUBJECT TO
APPROVAL BY THE STATE."**

**THIS SENTENCE IS NEEDED WHEN THERE IS A QUESTION ABOUT THE
FINANCIAL WHEREWITHAL OF THE VENDOR TO SELF RETAIN THE
EXPOSURE. THIS REQUIREMENT DOES NOT PERTAIN TO LARGE,
FINANCIALLY VIABLE POTENTIAL VENDORS.**

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor.

OPTIONAL SENTENCE: DELETE IF NOT USED

The amount of any deductible or self-retention is subject to approval by the State.

- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The State will be defended, indemnified, and held harmless to the full extent of any coverage actually secured by the Contractor in excess of the minimum requirements set forth above. The duty to indemnify the State under this agreement shall not be limited by the insurance required in this agreement.
- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies.
- 5) The insurance required in this agreement, through a policy or endorsement, shall include:
 - a) a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
 - b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned State representative;
 - c) a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
 - d) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
 - e) cross liability/severability of interest for all policies and endorsements;
 - f) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
 - g) The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.

NOTE: SENTENCE (6)

**WHEN AN ADDITIONAL INSURED ENDORSEMENT IS REQUIRED IT MAY
TAKE UP TO 90 DAYS UNTIL THE INSURANCE CARRIER PROVIDES IT.
MAKE SURE THAT YOU VERIFY RECEIPT OF THE ENDORSEMENT WITHIN
90 DAYS.**

- 6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
- 7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

If Contractor's insurance carrier cannot provide the insurance requirements listed above, Contractor will be required to purchase a project-specific insurance policy on behalf of State including but not limited to an Owner's Protective Liability insurance policy or a Project Management Protective Liability insurance policy with an occurrence limit of not less than \$1,000,000 and an aggregate of \$2,000,000. Said insurance shall be kept in force until the project is accepted by State.

For some large construction projects it may be determined that the most effective insurance would be the purchase of All Risk Builder's Risk coverage. Requirements for such coverage should include:

All Risk Builder's Risk insuring the interest of the State, contractor(s) and subcontractors of all tiers including coverage on an All Risk basis, including but not limited to, coverage against fire, lightning, wind damage, hail, explosion, riot or civil commotions, aircraft and other vehicles, collapse, flood, earth movement, and coverage available under the so-called Installation Floater. The policy(ies) for such coverage shall be secured and maintained by contractor in an amount equal to the Full Completed Value of the project. Any deductible amount under the policy(ies) shall be the sole responsibility of the Contractor.

For operations involving a risk of environmental pollution such as a ruptured pipeline, contractors should be required to provide proof of pollution liability coverage. Requirements should include:

Pollution Liability. Contractor shall provide Contractor's Pollution Liability coverage for Personal Injury, Property Damage and Cleanup Cost arising from pollution conditions caused by the operations of the Contractor for limits of \$5,000,000. Occurrence coverage is preferred but coverage may be provided on a claims-made form that includes a three year tail coverage endorsement. Coverage shall include contractual liability coverage for claims arising out of liability of subcontractors, loading and unloading, unlimited complete operations, and non-owned disposal site coverage (if applicable).

Agreements with Political Subdivisions when subcontractor will be hired by Political Subdivision:

The following language should be added to the appropriate indemnification and insurance requirements for the subcontractor after a completed analysis if the risks of the subcontract as explained earlier in this section.

Indemnification

State and Political Subdivision each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement. In addition, Political Subdivision shall require all subcontractors, prior to commencement of an agreement between Political Subdivision and the subcontractor, to:

Insurance

The State and Political Subdivision each shall secure and keep in force during the term of this agreement, from an insurance company, government self-insurance pool or government self-retention fund authorized to do business in North Dakota, commercial general liability with minimum limits of liability of \$250,000 per person and \$1,000,000 per occurrence.

In addition, Political Subdivision shall require all subcontractors, prior to commencement of an agreement between Political Subdivision and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

Leases

Default lease indemnification and insurance provisions:

Indemnification

Lessor agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers and employees (State), from and against claims based on the vicarious liability of the Lessor or its agent, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. The legal defense provided by Lessor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Lessor also agrees to defend, indemnify, and hold the State harmless for all costs, expenses and attorneys' fees incurred if the State prevails in an action against Lessor in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

Insurance

Lessor shall secure and keep in force during the term of this agreement and Lessor shall require all subcontractors, prior to commencement of an agreement between Lessor and the subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- 1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 3) Property insurance insuring the full and true value of all Landlord's (or Tenant's) real and personal property located on or in the building in which the leased premises are located for all losses.
- 4) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this contract.

NOTE: OPTIONAL CLAUSE (5) EMPLOYER'S LIABILITY.

**THIS COVERAGE IS RECOMMENDED FOR CONTRACTORS DOMICILED
OUTSIDE THE STATE OF NORTH DAKOTA.
DELETE (5) IF CONTRACTING WITH A
RESIDENT (NORTH DAKOTA) VENDOR.**

OPTION: DELETE IF NOT REQUIRED

- 5) Employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

NOTE: OPTIONAL SENTENCE IN (1)

**"THE AMOUNT OF ANY DEDUCTIBLE OR SELF-RETENTION IS SUBJECT TO
APPROVAL BY THE STATE."**

**THIS SENTENCE IS NEEDED WHEN THERE IS A QUESTION ABOUT THE
FINANCIAL WHEREWITHAL OF THE VENDOR TO SELF RETAIN THE
EXPOSURE. THIS REQUIREMENT DOES NOT PERTAIN TO LARGE,
FINANCIALLY VIABLE POTENTIAL VENDORS.**

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor.

OPTIONAL SENTENCE: DELETE IF NOT USED

The amount of any deductible or self-retention is subject to approval by the State.

- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
- 3) The duty to defend, indemnify, and hold harmless the State under this agreement shall not be limited by the insurance required in this agreement.
- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies.
- 5) The insurance required in this agreement, through a policy or endorsement, shall include:
- a) a "Waiver of Subrogation" waiving any right to recovery the insurance company may have against the State;
 - b) a provision that the policy and endorsements may not be canceled or modified without thirty days' prior written notice to the undersigned State representative;
 - c) a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;

- d) a provision that Contractor's insurance coverage shall be primary (i.e. pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be in excess of the Contractor's insurance and shall not contribute with it;
- e) cross liability/severability of interest for all policies and endorsements;
- f) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
- g) The insolvency or bankruptcy of the insured Contractor shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Contractor from meeting the retention limit under the policy.

NOTE: SENTENCE (6)

**WHEN AN ADDITIONAL INSURED ENDORSEMENT IS REQUIRED IT MAY
TAKE UP TO 90 DAYS UNTIL THE INSURANCE CARRIER PROVIDES IT.
MAKE SURE THAT YOU VERIFY RECEIPT OF THE ENDORSEMENT
WITHIN 90 DAYS.**

- 6) The Contractor shall furnish a certificate of insurance to the undersigned State representative prior to commencement of this agreement. All endorsements shall be provided as soon as practicable.
- 7) Failure to provide insurance as required in this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

If the terms of the Lease do not require the landlord to provide snow and ice removal and maintenance on walkways and parking lots or to maintain common areas, or if it is unlikely members of the public will visit the facility, and for routine political subdivision lease agreements, the following indemnification and insurance language is acceptable:
Indemnification

Lessor and Lessee each agrees to assume its own liability for any and all claims of any nature including all costs, expenses and attorneys' fees which may in any manner result from or arise out of this agreement.

Insurance

Landlord (or Tenant) shall secure and keep in force during the term of this agreement, from insurance companies or a government self-insurance pool authorized to do business in the state of North Dakota, the following insurance coverages:

- 1) Commercial general liability, including contractual coverage, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- 2) Workers' compensation coverage meeting all statutory requirements.
- 3) Property insurance insuring the full and true value of all Landlord's (or Tenant's) real and personal property located on or in the building in which the leased premises are located for all losses.

The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self retention amount of other similar obligations under the policies shall be the sole responsibility of the Landlord (or Tenant). The amount of any deductible or self retention is subject to approval by the State.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State. "Follows form" means the excess policy must be written with the same terms and conditions as the policy to which it is excess.
- 3) Landlord (or Tenant) shall furnish a certificate of insurance evidencing the required coverages are in effect and providing that the coverages may not be canceled or modified without thirty (30) days prior written notice to State.
- 4) Failure to provide insurance as required in this agreement is a material breach of contract entitling State to terminate this agreement immediately.

Limiting the Liability of Certain Vendors

The need for State agencies and facilities to purchase software, communication, and electronic equipment has presented a new challenge for state procurement - that of a vendor's request to limit its liability.

This issue is not unique to North Dakota. In fact, state and corporate members of the National Association of Chief Information Officers of the States (NASCIO) formed a subcommittee to address the issue because it is of nationwide concern. That subcommittee published the *NASCIO Procurement Subcommittee's Recommendations on Liability Limitations for State IT Contracting*. That document contains specific recommendations for contractually addressing liability for direct and indirect damages in IT contracts. It recommends that states *should hold* vendors responsible for direct damages arising out of a contract; and that states *should not hold* vendors responsible for indirect damages liability unless responsibility is specifically allocated to the vendor in the contract.

By way of defining the difference between direct and indirect damages - *direct damages* are compensation for losses associated with the value of the performance contracted for as contrasted to *indirect damages* which are compensation for the loss of a benefit expected from the use of the equipment. For example, if a computer program is purchased for \$1,000 and, if merchantable, would yield profits or cost savings to the business of \$10,000, if that program is defective, the "direct" damages would be \$1,000.00. The \$10,000 lost profits or expected cost savings are consequential or "indirect" damages.

The 2005 Legislature enacted N.D.C.C. § 32-12.2-15 which provides a method for state agencies or facilities to negotiate with vendors to limit a vendor's indirect damages liability for software, communication, or electronic equipment contracts if it is determined by the Attorney General and the Director of OMB that it is in the State's best interest to do so.

The process a State agency or facility should use to obtain that authorization is to complete SFN 54345 form, the *Application for Approval to Limit the Liability of a Vendor*. The form,

along with a copy of the proposed contract and Statement of Work can be filed with OMB or the office of the Attorney General for processing. OMB, through Risk Management, works with ITD to analyze the exposure presented by a proposed agreement and recommends what level of limit of a vendor's liability would be acceptable, if any.

Remember, without obtaining authorization from the Director of OMB and the Attorney General, a state employee would not have the authority to limit a vendor's liability and the act of signing a contract without proper authorization would probably be outside the scope of the employee's employment.

CERTIFICATES OF INSURANCE AND ENDORSEMENTS

Contractors are required to provide the State with a Certificate of Insurance and/or Endorsement documenting the required coverages are in place, prior to commencement of the contract. When an additional insured endorsement is required it may take up to 90 days until the insurance carrier will provide it. Make sure that you verify receipt of the endorsement within 90 days. Visit the OMB State Procurement Office website at www.state.nd.gov.spo under Solicitation Templates for a sample letter of instruction for the successful vendor.

Certificate of Insurance: A completed Certificate of Insurance should contain the following information:

- Name and address of agent, phone number and fax number;
- Name of insurance company(ies) and policy number(s);
- Policy period;
- Name and street address of insured;
- Description of coverage(s);
- Name/Number of Project;
- Policy limits as provided in the contract;
- Special instructions or terms of coverage (for example: identification of project or operations with respect to certificate being issued);
- State and/or agency listed as the certificate holder; and
- Signature of the insurer's agent or representative and date.

Endorsement: When the contract terms provide that the State must be named as an "additional insured," an endorsement is required. The only way that an entity other than the named insured (contractor) is protected under the terms of the contractor's insurance policy is by adding, by endorsement, an additional insured. Under these circumstances, the certificate of insurance should note the additional insured ("Special instruction or terms of coverage" should show the addition of the State and/or agency as additional insured and/or waivers of subrogation). In addition, an endorsement needs to be provided prior to commencement of the contract.

Isn't The Certificate Of Insurance Enough If It Names The State As An Additional Insured?

An agent issues a certificate of insurance and, unless the agent is authorized to bind an insurance company, is not documentation by the contractor's insurer that the coverage is in place. A certificate of insurance does not confer rights upon a certificate holder or alter,

extend, or amend policy coverage. The only proof that an insurance company has knowledge of and agrees to accept the contractual indemnification obligation of the contractor is an endorsement. Without an endorsement documenting the required coverage is in place, a contractor may not have the financial resources to comply with the contract terms. The endorsement should conform to the insurance requirement portion of the contract detailing the endorsement's terms.

SAMPLE LETTER WHEN CERTIFICATE IS INADEQUATE

Date:

To:

To Whom It May Concern:

Thank you for forwarding the Certificate of Insurance. After review, the certificate does not reflect required limits and/or coverages as outlined in the contract dated _____. Please amend the certificate form to reflect the following:

[INSERT THE INSURANCE PROVISIONS FROM CONTRACT]

Please forward the amended Certificate by (10 days) . If you have any questions, please call me at _____.

Sincerely,

**SAMPLE LETTER FOR
EXPIRATION OF CERTIFICATE OF INSURANCE**

Date:

To:

To Whom It May Concern:

Our records indicate that your Certificate of Insurance currently on file with us has either expired or will be expiring. Please have your insurance agent send us a new Certificate of Insurance evidencing the following:

***[INSERT THE INSURANCE PROVISIONS FROM
CONTRACT]***

[Delete if not using Intermediate and Additional Insured Endorsement]

Further, ensure that the state of North Dakota, **Agency Name** is named as an additional insured and provide an Endorsement to the policy within 30-60 days documenting that the required coverage is in place.

If you have any questions, please call me at _____.

Sincerely,

SAMPLE -- CERTIFICATE OF INSURANCE					DATE (MM/DD/YY)	
PRODUCER AGENT NAME ADDRESS CITY STATE ZIP			THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. <div style="text-align: center; margin-top: 10px;">COMPANIES AFFORDING COVERAGE</div> Company A Company B Company C Company D Company E			
INSURED CONTRACTOR NAME ADDRESS CITY STATE ZIP			Company A Company B Company C Company D Company E			
COVERAGES THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIODS INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES, LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS						
CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A	GENERAL LIABILITY				General Aggregate	\$1,000,000
	<input checked="" type="checkbox"/> Commercial General Liability				Products-Comp/OP Agg	\$1,000,000
	<input type="checkbox"/> Claims Made <input checked="" type="checkbox"/> Occur				Personal & Adv Injury	\$1,000,000
	<input type="checkbox"/> Owner's & Contractor's Prot				Each Occurrence	\$1,000,000
	<input checked="" type="checkbox"/> Contractual Liability				Fire Damage (Any one fire)	XXXX
	<input checked="" type="checkbox"/> Stop Gap Employers Liability	(If part of this policy)			Med Exp (Any one person)	XXXX
	AUTOMOBILE LIABILITY					
B	<input checked="" type="checkbox"/> Any Auto				Combined Single Limit	\$1,000,000
	<input type="checkbox"/> All Owned Autos				OR	
	<input type="checkbox"/> Scheduled Autos				Bodily Injury and Property Damage	
	<input type="checkbox"/> Hired Autos				Per Person	\$1,000,000
	<input type="checkbox"/> Non-Owned Autos				Per Accident	\$1,000,000
	EXCESS LIABILITY				Each Occurrence	
	<input type="checkbox"/> Umbrella Form				Aggregate	
	<input type="checkbox"/> Other than Umbrella Form					
C	WORKERS' COMPENSATION				<input checked="" type="checkbox"/> Statutory Limits	
	AND EMPLOYERS' LIABILITY	(If part of this policy)			Each Accident	\$1,000,000
					Disease - Policy Limit	\$1,000,000
					Disease - Each Employee	\$1,000,000
D	PROFESSIONAL ERRORS AND OMISSIONS				Each Claim	\$1,000,000
	3 Year Tail <input checked="" type="checkbox"/>				Annual Aggregate	\$1,000,000
DESCRIPTION OF OPERATIONS/LOCATIONS/SPECIAL ITEMS 1. Description of Project 2. The following provisions shall be endorsed onto the Contractor's General Liability Policy. (Attach a copy of each endorsement) <ul style="list-style-type: none"> State of North Dakota and its agencies, officers and employees (State) are as Additional Insured Waiver of Subrogation against the State Any attorney who represents the State must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. 54-12-08) Contractor's insurance is primary for the State Cross Liability / Severability of Interest provision 						
CERTIFICATE HOLDER STATE OF NORTH DAKOTA AGENCY ADDRESS CITY STATE ZIP				CANCELLATION SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT.		
AUTHORIZED REPRESENTATIVE				_____		

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS –
SCHEDULED PERSON OR ORGANIZATION – VICARIOUS LIABILITY –
PRIMARY AND NONCONTRIBUTORY**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

<p>Name of Person or Organization:</p> <p>Project:</p> <p>Location of Project:</p>

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. SECTION II – WHO IS AN INSURED is amended to include as an additional insured the person or organization shown in the Schedule, subject to the following provisions:

1. This insurance applies only to the extent that you are held liable for your ongoing operations performed for the additional insured shown in the Schedule.
2. This insurance does not apply to any "bodily injury" or "property damage" resulting from any act or omission by, or willful misconduct of the additional insured shown in the Schedule, whether the sole or a contributing cause of the loss. The coverage afforded to the additional insured is limited solely to the additional insured's "vicarious liability" that is a specific and direct result of your conduct.
3. The insurance provided to the person or organization shown in the schedule is Primary Insurance and we will not seek contribution from any other insurance available to that additional insured.

B. With respect to the insurance afforded to this additional insured, the following exclusion is added:

2. Exclusions

This insurance does not apply to "bodily injury" or "property damage" occurring after:

- (1) All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the site of the covered operations has been completed; or
- (2) That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

C. "Vicarious liability" as used in this endorsement means liability that is imposed on the additional insured solely by virtue of its relationship with you, and not due to any act or omission of the additional insured.

SAMPLE

ENDORSEMENT TO GENERAL LIABILITY COVERAGE - **Intermediate**

IT IS HEREBY UNDERSTOOD AND AGREED THAT THE POLICY IS AMENDED AS FOLLOWS:

1. State of North Dakota and its agencies, officers and employees (State) are named as Additional Insured.
2. The Insurer waives all rights of subrogation against the State.
3. Any attorney who represents the State must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. 54-12-08).
4. This insurance policy shall be primary as respects any insurance, self-insurance or self-retention maintained by the State and any insurance, self-insurance or self-retention maintained by the State shall be in excess of this policy and shall not contribute with it.
5. Cross Liability / Severability of Interest.

Insured _____

Policy # _____ issued by _____
Insurance Company

Effective date _____

DEFINITIONS OF COMMON INSURANCE TERMS

(More Definitions Located In the Glossary of the Risk Management Manual)

A

Additional Insured—A person or entity other than the named insured who is protected by the policy, often in regard to a specific interest. This coverage is typically extended through a policy endorsement. Contrast with “Named Insured.”

Adjuster—A person who settles claims for insurers.

Aggregate— Cumulative. An aggregate limit of \$1 million means that when the total of all claims in a year reaches \$1 million, coverage ceases.

All States Endorsement—Automatically extends statutory workers compensation coverage to states where the contractor’s new operations are added during the policy term.

B

Bodily Injury—Injury, sickness, or disease sustained by a person, including death resulting therefrom. See also Personal Injury.

Bond—An obligation of the insurance company to protect one against financial loss caused by the acts of another.

Breach—Failure to live up to the warranties or condition of an insurance contract. For example, a fire sprinkler warranty is breached if the sprinklers are not operational, if the failure is from conditions under the insured’s control.

C

Cancellation—The termination of an insurance policy or bond before it’s expiration by the insured or insurer.

Carrier—An insurance company.

Certificate of Insurance—A form used to convey information (valid only as of the date it is issued) regarding the client’s insurance coverages. It does not confer rights upon a certificate holder or alter, extend, or amend policy coverage.

CGL—Commercial General Liability Coverage—Principal form of liability insurance for businesses that provides coverage for bodily injury and property damage, personal and advertising injury, contractual, products and completed operations on an occurrence basis.

Claim--The amount of damage for which a third party seeks reimbursement from the insured and/or insured seeks reimbursement from his or her insurance company. Once the amount has been determined, it becomes a loss. Claim and loss are often used interchangeably. Self-insured losses are often called claims.

Contractual Liability—Coverage for liability assumed under contract.

Coverage—A term used to designate the type of protection provided by an insurance policy.

D

Deductible—An amount of loss to be absorbed by the insured before an insurer becomes liable for payment.

E

Effective Date—The date on which an insurance policy goes into effect starting date.

Employer's Liability--Liability insurance for employers to protect against bodily injury claims resulting from accident or disease of employees not covered by workers compensation. Examples: Employee rejects or is excluded from workers compensation; injuries not covered by workers compensation; suit by spouse; injuries in federal jurisdiction or monopolistic states.

Endorsement—An amendment to an insurance policy that in some way modifies the original contract provisions.

Errors and Omissions-- Commonly referenced as E&O, or professional liability. Applies when requested services require special intellectual ability rather than strict physical activity. Examples: Engineers, accountants, consultants, technology designers/installers, public officials, directors and officers. Medical personnel E&O is often called malpractice coverage.

Exclusions--Specific items identified as not being covered under a particular policy.

F

Follows Form—A requirement that an excess policy to be written with the same terms and conditions as the policy to which it is excess.

H

Hold Harmless Agreement—A clause found in contracts and leases that shifts (or attempts to shift) liability for loss from one party to another.

I

Indemnify/Indemnity—Making “whole” or restoring financially, after a loss.

Indemnity Agreement—Same as a hold harmless agreement.

Insured—The person who has purchased an insurance policy and is protected by it; sometimes also referred to as the “assured.”

Insurer—The insurance company.

L

Lessee—A tenant who has signed a lease.

Liability Insurance—Any form of coverage whereby the insured is protected against claims of other parties arising from specified causes.

Limit—The maximum amount the insured can collect under the terms of a policy.

Loss—Any destruction or disappearance of value.

N

Named Insured—Any person, firm or corporation, or any member thereof, specifically designated by name as insured(s) in a policy as distinguished from the others who, though unnamed, are protected under some circumstances. A common application of this latter principle is in auto liability policies wherein by a definition of “insured,” coverage is extended to other drivers using the car with the named insured’s permission. Other parties can also be afforded protection of an insurance policy through being named an Additional Insured (see definition) through a policy endorsement. Other rights and responsibilities of the Named Insured include: rights to request policy endorsements or additional coverage, terminate policy, receive premium refund; obligations to notify insurer of a claim, pay premiums, and to comply with all other policyholder obligations.

Negligence—Failure to exercise that degree of care that a reasonable person would exercise under the same circumstance.

P

Property Insurance—Insurance that indemnifies an individual or entity with an ownership interest in real or personal property for loss of or damage to property or the loss of business income-producing ability.

R

Reinsurance—A contract to transfer all or a portion of the insurer's (ceding insurance company's) risk, assumed on behalf of its insureds, to another insurer/reinsurer. The reinsurer agrees to reimburse the insurer/ceding insurance company for the claim's reinsured portion. A reinsurer may, in turn, seek reinsurance on some portion of the risk it has reinsured, a process known as "retrocession."

Risk—The chance or probability of financial loss.

S

Self-insurance—Retention of risk. Generally refers to a planned program for financing or otherwise recognizing losses. It is not the same as insurance.

Stop Gap--Specific form developed to provide employer's liability coverage for the employer's activities in monopolistic workers compensation states when the employer is domiciled in a different state.

Subrogation--The right of an insurer to recover from a third party an amount paid on a loss when the third party is at fault.

T

Tail Coverage--Provides for a specific time period after the policy expiration during which the insured can file a claim that occurred but was not reported during the claims-made policy term.

Term--The length of time for which a policy or bond is written.

Third Party--Someone other than the parties directly involved in an action or transaction; someone other than the insured and the insurer.

U

Umbrella or Excess Policy—A broad, high-limit liability policy usually requiring the insured to carry primary or underlying insurance.

V

Vicarious Liability—Requires each party to assume its own liability, but provides additional protection for the State in that the Contractor agrees to be responsible for any liability alleged against the State resulting from the Contractor's sole actions, and provides defense for the State to resolve those allegations.

W

Waiver—The relinquishment of a known right; for example waiver or subrogation under a fire insurance policy.

Waiver of Subrogation—A waiver by the named insured giving up any right of recovery against a third party. For example, in a construction contract, if a contractor provides a waiver of subrogation on a workers' compensation policy, the contractor (or its insurer) would not be able to file a claim against a third party for recovery for injury to an employee occurring on its premises where the construction is taking place. Normally an insurance policy requires that subrogation (recovery) rights be preserved. In commercial property insurance, a written waiver of subrogation rights is permitted if it is executed before the loss occurs.